No. 77-641

In the Supreme Court of the United States

OCTOBER TERM, 1977

MAURO CANTU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 557 F. 2d 1173.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1977 (Pet. App. A). A petition for rehearing was denied on October 3, 1977 (Pet. App. C). The petition for a writ of certiorari was filed on November 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the charge against petitioner was the result of impermissible selective prosecution.

2. Whether petitioner's motion to suppress evidence was properly denied.

3. Whether 8 U.S.C. 1324(a)(3), which makes it a crime to shield illegal aliens from detection, covers only activities that are part of the smuggling process.

4. Whether the evidence was sufficient to sustain petitioner's conviction.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of conspiracy and shielding illegal aliens from detection, in violation of 18 U.S.C. 371 (Count I) and 8 U.S.C. 1324 (Counts II and III). He was sentenced to four years' imprisonment and a $3000 fine (Pet. 5). The prison term was suspended, and petitioner was placed on probation for five years. The court of appeals affirmed (Pet. App. B).

The government's evidence at trial showed that on June 18, 1976, the Immigration and Naturalization Service received information that petitioner, the owner of a restaurant in San Antonio, Texas, was employing illegal aliens in his restaurant (Tr. 61-63). The same day, agents of the Service went to the restaurant to question the employees about their residence status (Tr. 75-76, 106-107). When petitioner refused to admit the agents without a search warrant (Tr. 112), the agents remained outside the restaurant to await the arrival of a warrant.

While the agents were awaiting the warrant, petitioner made arrangements for two of his employees to leave the restaurant immediately, accompanied by restaurant patrons. The two employees were both illegal aliens who had worked for petitioner during previous illegal visits to the United States (Tr. 64-65, 130-134, 186). One of the

patrons who was asked to escort an employee out of the restaurant admitted at trial that he knew the employee worked for petitioner, that he was aware that INS agents were outside the restaurant, and that he suspected the employee was an illegal alien (Tr. 171-174). The other patron, who had been dining with members of his family, first pretended to converse with the employee and then directed the employee to walk between his sons as they left the restaurant (Tr. 190). The agents arrested both aliens in the restaurant parking lot after determining their illegal status (Tr. 113-115, 139, 173, 190, 225).[1] On the basis of information obtained from the aliens at that time, the agents arrested petitioner as well.

ARGUMENT

1. Petitioner first contends (Pet. 7-13) that the government was guilty of "selective, discriminatory prosecution" and complains of the district court's refusal to grant a hearing at which he could develop the facts to support this allegation. Petitioner concedes, however, that "there was no tangible proof to present" to demonstrate selective prosecution (Pet. 11). Instead, in support of his claim, he offered at trial to present evidence that he was a member of a group that aided immigrant workers and that other employers had not been prosecuted for employing illegal aliens (Tr. 19-37).[2] As the court of

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[1]A third illegal alien was arrested outside the restaurant shortly after the INS agents arrived (Tr. 122, 254, 258, 301); a fourth illegal alien employed by petitioner successfully evaded the agents at the restaurant by leaving with patrons (Tr. 218-221); and a fifth was arrested inside the restaurant after the search warrant arrived (Tr. 118-119, 134, 256).

[2]When asked by the judge during the hearing, "What proof do you have of selective prosecution in this case for your bill that's hard, proveable [sic], cold evidence that selective prosecutions have been

appeals noted, however, merely employing illegal aliens does not violate Section 1324. Accordingly, petitioner's assertion that other employers were not prosecuted is irrelevant to his claim that he was selectively prosecuted for shielding illegal aliens from detection. Because petitioner failed to prove even a colorable entitlement to the defense of selective prosecution, the district court properly overruled his motion to dismiss the indictment.[3] See *United States* v. *Murdock*, 548 F. 2d 599 (C.A. 5); cf. *Oyler* v. *Boyles*, 368 U.S. 448.

2. Petitioner further contends (Pet. 13-19) that evidence obtained as a result of the search of his restaurant should have been suppressed because the affidavit upon which the search warrant was based failed to meet the test laid down by this Court in *Aguilar* v. *Texas*, 378 U.S. 108. He fails, however, to point to any evidence that was produced as a result of the allegedly improper search. In fact, the only product of the "search" of the restaurant was the arrest of another alien employee long after the arrest of the two aliens named in the indictment. And that employee was questioned and arrested in a public area of the restaurant (Tr. 67), as to which no search warrant would have been required in any event. See *United States* v. *Santana*, 427 U.S. 38; *United States* v. *Watson*, 423 U.S. 411.

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ordered or accomplished by the U.S. Attorney's office or by the Executive Branch or any other agency against Mr. Cantu" (Tr. 31), petitioner's counsel indicated that the testimony he intended to offer would show that "other people in South Texas and throughout the southwestern United States hire aliens and they are not charged with shielding" (Tr. 31-32).

[3]Petitioner's reliance on *United States* v. *Falk*, 479 F. 2d 616 (C.A. 7), *United States* v. *Steele*, 461 F. 2d 1148 (C.A. 9), and *United States* v. *Crowther*, 456 F. 2d 1074 (C.A. 4), is misplaced. In all of these cases the courts of appeals found that appellants had made out a *prima facie* case of discriminatory prosecution.

Petitioner also objects to the questioning and arrest of the two alien employees in the restaurant parking lot (Pet. 16-19), apparently on the theory that their detention led to his arrest. Petitioner, however, has no standing to assert that claim. The arrest of the alien employees "invaded no right of privacy of person or premises" of petitioner (*Wong Sun* v. *United States*, 371 U.S. 471, 492), since the arrest took place not within petitioner's restaurant, but outside in a parking lot open to the public.[4]

3. Petitioner next claims that 8 U.S.C. 1324(a)(3), the statute under which he was charged, is limited to activities that are part of the process of smuggling aliens into this country. On its face, however, the statute reaches all acts of knowingly concealing, harboring or shielding illegal aliens from detection. Nothing in the statute or in its legislative history suggests that its coverage is limited to actions related to bringing aliens into the United States.[5]

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[4]In any event, the detention and questioning of these aliens was entirely proper. The INS agents had received information that numerous aliens who had entered the United States illegally were working at petitioner's restaurant. In addition, the Service had previously apprehended illegal aliens employed by petitioner at his restaurant, including the two aliens stopped in the parking lot, who had worked for petitioner during a prior illegal visit to the United States (Pet. App. 4a, 5a). These factors constituted specific articulable facts reasonably warranting suspicion, that the two aliens were illegally in the United States. See *Shu Fuk Cheung* v. *Immigration and Naturalization Service*, 476 F. 2d 1180 (C.A. 8); *Au Yi Lau* v. *United States Immigration and Naturalization Service*, 445 F. 2d 217 (C.A. D.C.), certiorari denied, 404 U.S. 864; *Yam Sang Kwai* v. *Immigration and Naturalization Service*, 411 F. 2d 683 (C.A. D.C.), certiorari denied, 396 U.S. 877. The questioning of the two aliens disclosed their illegal status, thus furnishing the immigration officers with probable cause to arrest.

[5]The legislative history of Section 1324 makes it clear that the purposes of that Section extend beyond merely preventing smuggling of aliens. Both the House and Senate reports characterized the

The two other circuits that have considered this precise question have similarly refused to limit the scope of Section 1324 to the smuggling process. See *United States* v. *Acosta de Evans*, 531 F. 2d 428, 430, n. 4 (C.A. 9), certiorari denied, 422 U.S. 1010; *United States* v. *Lopez*, 521 F. 2d 437, 440 (C.A. 2), certiorari denied, 423 U.S. 995. As the Second Circuit stated in *Lopez, supra*, 521 F. 2d at 440:

> At least two provisions in the statute as finally enacted are inconsistent with an intent to limit the prohibition to conduct connected with the smuggling of the alien into the United States. The first is a proviso in §1324(a)(2) to the effect that in order to be guilty of knowingly transporting an illegal alien the person charged must "have reasonable grounds to believe that [the alien's] entry into the United States occurred less than three years prior thereto." Transportation at a point in time so long after the illegal entry would not normally be in furtherance of the smuggling process, which would long since have been completed. Secondly, Congress expressly provided that "for purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." Since such employment would not normally be related to the smuggling process this exemption would, under Lopez's construction, be unnecessary.

purposes of the statute as being to prevent aliens "from entering *or remaining* in the United States illegally." S. Rep. No. 1145, 82d Cong., 2d Sess. 2 (1952); H.R. Rep. No. 1377, 82d Cong., 2d Sess. 1 (1952). The language from the Senate Report on which petitioner relies (Pet. 22), S. Rep. No. 1515, 81st Cong., 2d Sess. 644 (1950), was merely a characterization of the predecessor to Section 1324. Similarly, the case of *United States* v. *Evans*, 333 U.S. 483, on which petitioner appears to rely, was a construction of the same predecessor statute, not a construction of Section 1324, which was passed in part to remedy the restrictive reading of the *Evans* case.

4. Finally, petitioner contends (Pet. 24-26) that the evidence was insufficient to support his conviction of conspiracy and of shielding illegal aliens. The evidence adduced at trial, however, clearly established that petitioner knew of the aliens' illegal status and that the two patrons who were named as unindicted co-conspirators agreed, upon his request, to escort the aliens out of the restaurant in an apparent effort to guide them by the INS agents undetected. In light of the circumstances of their departure from the restaurant, it was reasonable for the jury to infer that both co-conspirators knew the illegal status of the aliens. Both men were aware that the INS had staked out the restaurant; both knew that the alien he was to escort out of the restuarant spoke only Spanish; and in fact, one of them admitted on the stand that he suspected his companion was an illegal alien (Tr. 174). The evidence was thus plainly sufficient to sustain petitioner's conviction for both conspiracy and the substantive offenses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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